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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ALLEN R. COBB, 06-B-1637,

Petitioner,

-v-

DAVID UNGER,

Respondent.

DECISION AND ORDER
09-CV-491M

By Order filed September 20, 2011 (Doc. No. 21), this Court directed, *inter alia*, that Petitioner's motion requesting leave to amend his habeas corpus petition (Doc. No. 14) be denied without prejudice to refiling by no later than October 17, 2011, and that if Petitioner elected to refile the motion to amend, he would be required to concurrently file a motion to stay the petition and hold it in abeyance in accordance with the factors set forth in *Rhines v. Weber*, 544 U.S. 269, 277, 125 S. Ct. 1528, 161 L. Ed. 2d 440 (2005). The September 20, 2011 Order further directed that in the event Petitioner did not file a motion to amend and motion to stay his petition by October 17, 2011, the Clerk of the Court would serve, without further order, a copy of the petition upon the respondent, and that Respondent should answer the petition in accordance with the schedule directed by the Court.

Petitioner did not refile a motion to amend the petition, and concurrently file a motion to stay the petition, by October 17, 2011. Thereafter, on October 26, 2011, the Clerk of the Court erroneously entered judgment dismissing the petition rather than directing that the petition be served as directed in the September 20 Order (Docket No. 22).

Accordingly, IT IS HEREBY ORDERED that:

1. The judgment entered on October 26, 2011 is hereby vacated;

2. The Clerk of the Court is directed to reopen this action; and

3. The Clerk of the Court shall serve a copy of the petition (Docket No. 1) and the amendment thereto (Docket No. 11), together with a copy of the order filed September 20, 2011 (Doc. No. 21) and this order, by certified mail, upon respondent Superintendent of Wyoming Correctional Facility and upon Office of the Attorney General, Federal Habeas Unit, 120 Broadway, 12th Floor, New York, New York 10271-0332. To advise appropriate Erie County officials of the pendency of this proceeding, the Clerk of Court shall also mail a copy of this order to the District Attorney of Erie County.

4. Respondent shall file and serve an **answer** to the petition, in accordance with Rules 4 and 5 of the Rules Governing Section 2254 Cases in the United States District Courts, by no later than forty-five (45) days from the date that respondent is served with a copy of the petition. Further, the answer shall state whether a trial or any pre-trial or post-trial evidentiary proceeding was conducted. If any such proceeding was conducted, under the authority of Rule 4, the Court hereby directs respondent to provide to the Court the transcript of the proceeding, together with any record(s) of, and documents relating to, such proceeding, and such documents will be filed in the official record of this case.

Respondent also shall file and serve by the above date a **memorandum of law** addressing each of the issues raised in the petition and including citations of relevant supporting authority.

Within thirty (30) days of the date this order is served upon the custodian of the records, the Clerk of Court or any other official having custody of the records of the

proceedings in County Court at issue now before this Court shall submit such records to respondent or the respondent's duly authorized representative.

If petitioner appealed from the judgment of conviction or from an adverse judgment or order in a post-conviction proceeding, under the authority of Rule 4, the Court hereby directs respondent to provide to the Court a copy of the briefs and record on appeal and the opinions of the appellate courts, if any, and such documents will be filed in the official record of this case.

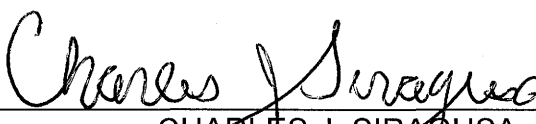
Petitioner shall have thirty (30) days upon receipt of respondent's answer to file a written response to the answer and memorandum of law.

Within thirty (30) days of the date respondent is served with a copy of this order, respondent may file a motion for a more definite statement or a motion to dismiss the petition, accompanied by appropriate exhibits which demonstrate that an answer to the petition is unnecessary. The timely filing of such motion shall extend the time for filing an answer for fourteen (14) days, but the failure of the Court to act upon the motion within that time shall not further extend the time for filing an answer.

PETITIONER MUST FORWARD A COPY OF ALL FUTURE PAPERS AND CORRESPONDENCE TO THE ATTORNEY APPEARING FOR RESPONDENT.

SO ORDERED.

Dated: November 28, 2011
Rochester, New York



CHARLES J. SIRAGUSA
United States District Judge